**Inland Steel Company** *and* **Jessie Kauffman.** Case 13-CA-19138

September 16, 1982

## DECISION AND ORDER

On March 17, 1981, Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party each filed exceptions and a supporting brief. Respondent also filed cross-exceptions and a brief in support thereof and in opposition to the exceptions of the General Counsel and the Charging Party. Thereafter, the General Counsel filed a brief in response to Respondent's cross-exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

For reasons set forth fully in the attached Decision, we agree with the Administrative Law Judge's conclusion that it is appropriate here to dismiss the 8(a)(3) and (1) complaint by deferring to an arbitration award which held that Respondent acted for proper cause when it terminated Jessie Kauffman for falsifying her employment application. The General Counsel has alleged a violation of the Act because Respondent's discovery of Kauffman's falsification resulted from a personnel investigation begun when her union and other protected activities brought her name to Respondent's attention. The arbitrator found, however, that Respondent had no discriminatory intent in pursuing its investigation of Kauffman and that its discharge action was consistent with a long-established company rule.

The parties clearly litigated the statutory issue of discrimination before the arbitrator and he clearly considered that issue in deciding Kauffman's grievance.[2] In addition, we agree with the Administrative Law Judge that the arbitration award satisfies the requirements of *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955). In particular, we emphasize our agreement that the arbitration award is not, as our dissenting colleague contends, "clearly repugnant" to the purposes and policies of the Act.

The test of repugnancy under *Spielberg* is not whether the Board would have reached the same result as an arbitrator, but whether the arbitrator's award is palpably wrong as a matter of law.[3] Based on the record before the arbitrator here, a trier of fact could have inferred that Respondent initiated the investigation of Kauffman's personnel file for the purpose of discovering a reason to discharge her. Contrary to arguments made by the General Counsel and our dissenting colleague, however, Board law does not compel the drawing of such an inference.[4] There is no *per se* illegality in commencing an investigation of an employee who has come to an employer's attention by engaging in union and other protected concerted activities,[5] and disciplinary action based on such an investigation does not fall within the narrow class of "inherently destructive" acts which violate Section 8(a)(3) and (1) of the Act even without proof of specific discriminatory intent.[6]

Based on the foregoing, we conclude that the General Counsel has failed to demonstrate that the arbitration award upholding Kauffman's discharge is contrary to a clear and consistent line of Board and judicial precedent, and consequently is not clearly repugnant to the Act. Accordingly, we shall dismiss the complaint.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

MEMBER JENKINS, dissenting:

Contrary to my colleagues, I find that the arbitrator's decision in this case ignores well-established Board precedent, and therefore is repugnant to the purposes and policies of the Act and is un-

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] See, e.g., *Suburban Motor Freight, Inc.*, 247 NLRB 146 (1980).

Chairman Van de Water agrees that the statutory issue was raised and considered by the arbitrator herein but does not agree with the restrictions placed on deferral by *Suburban Motor Freight, Inc., supra.*

Since there is no issue in the instant case regarding the arbitrator's consideration of the unfair labor practice question, Member Hunter finds it unnecessary to rely or to pass on the Board's previous decision in *Suburban Motor Freight, Inc., supra*, or any of its ramifications.

[3] *International Harvester Company (Indianapolis Works)*, 138 NLRB 923, 929 (1962).

[4] See, e.g., *Pork Mining Company, Inc.*, 252 NLRB 99 (1980).

[5] We note that the General Counsel has not alleged an independent violation of Sec. 8(a)(1) based on the investigation itself.

[6] See *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). Although the dissent cites three Board cases for the proposition that discipline based on an investigation begun because of an employee's protected activity *is* an inherently destructive act of discrimination, the result in each of the cases cited turned on proof of specific discriminatory intent. See *Chrysler Corporation (Missouri Truck Plant)*, 242 NLRB 577 (1979); *Campbell's "66" Express, Inc.*, 238 NLRB 953 (1978); *American Motors Corporation*, 214 NLRB 455 (1974).

worthy of deference.[7] The Administrative Law Judge herein concluded that deferral of the allegation that Respondent discharged Jessie Kauffman for her protected concerted activities to the arbitrator's contrary determination that Respondent discharged Kauffman for falsifying her employment application was proper because the arbitrator "considered the factors which the Board considers (particularly animus and disparity of treatment) and concluded that the employees' discharge was . . . based . . . upon the violation of a longstanding rule." The undisputed facts show otherwise.

Jessie Kauffman filed a written application for employment with Respondent on February 8, 1978. The application stated, in accordance with Respondent's historical rule, that false statements of fact were grounds for discharge. To avoid rejection as over-qualified for the craft position she sought, Kauffman omitted from her application the 4 years she spent at Cornell University and stated instead that she was employed in a retail store during that time. On February 23, Respondent hired her and in May closed its investigation of her application.[8]

Kauffman joined the Union and became an organizer and leading proponent of its women's committee. She wrote articles in the Union's newspaper and engaged in various projects concerned with sex discrimination, and in this context brought upon herself the specific attention of Respondent's upper management personnel. On June 5, 1979, Kauffman addressed the East Chicago Human Rights Commission (ECHRC) as a member of the Union's women's committee and as an employee of Respondent. She told the Commission that Respondent engaged in discriminatory practice and asked how to prove such discrimination against women and minorities. Respondent's coordinator of manpower planning and utilization, Vincent Soto, attended this meeting, as was his custom, and arrived too late to hear Kauffman's name, but did hear her remarks about Respondent. Soto attempted to learn Kauffman's name after the meeting but failed to do so. Soto reported Kauffman's remarks, and those of another employee, to the staff of his section and its supervisor, Mezey, as "disparaging." On June 15, Mezey and Soto attended an ECHRC conference on affirmative action, where Soto and Mezey both saw Kauffman, and Soto objected publicly to Kauffman's inquiries about Respondent's affirmative action plan.

The next Monday, June 18, the first working day following the ECHRC conference, Mezey and Soto reviewed Kauffman's personnel file. This is the critical event in this case, for Mezey testified before the arbitrator that he reviewed Kauffman's personnel file because he was curious and "made natural inquiries . . . about her, her career and her [Union] involvement . . . that if she was . . . going to be active in the Union [he] ought to be aware of Jessie Kauffman." Before the Administrative Law Judge, Mezey gave an entirely new reason, i.e., that he was concerned whether "she was having problems in her department because of her voiciferous display against Inland Steel or against its employment process." Significantly, Mezey was undaunted by the fact that Kauffman's file showed her to be a good employee without any problems or complaints,[9] and nevertheless instigated a full investigation of her references. Consequently, on August 14, 1979, Respondent discharged Kauffman for the false statements in her employment application revealed by this investigation, in accordance with its established practice.

Kauffman's grievance over her discharge was denied by the arbitrator because he found, on the facts stated herein, that Respondent had discharged Kauffman for her false employment application, in accordance with its 35-year rule to that effect, and that Respondent did not discriminate against Kauffman for her protected activities. The arbitrator added that Respondent knew of those activities and had never attempted to interfere with them.

Of particular note is the arbitrator's conclusion that "[T]he fact that the Company may have begun a re-examination of the information contained in her application for employment after she served as spokesperson for a group of female employees who had attended a Human Relations Symposium, is in no way indicative of an attitude of harassment, discrimination or bias because of her sex or her legitimate Union activities." This conclusion is directly contrary to Board law, and therefore is repugnant to the purposes and policies of the Act. *Radio Television Technical School, Inc. t/a Ryder Technical Institute*, 199 NLRB 570 (1972); *Alfred M. Lewis, Inc.*, 229 NLRB 757 (1977); *Brewery Delivery Employees Local Union 46 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Port Distributing Corp.)*, 236 NLRB 1175 (1978).

The Board has held definitively that an employer violates Section 8(a)(3) when it discharges an employee on the ground of a false employment appli-

[7] *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955); *Radio Television Technical School, Inc. t/a Ryder Technical Institute*, 199 NLRB 570 (1972).

[8] Despite the presence of a letter of reference from Kauffman's high school counselor which referred to her "college training at Cornell University."

[9] Kauffman received no complaints about her work during her tenure with Respondent and Respondent found no reason to discipline her.

cation, where the knowledge of the falseness of the application has been established by an investigation which is begun because the employee's protected activity has come to the attention of the employer. *American Motors Corporation*, 214 NLRB 455 (1974); *Campbell's "66" Express, Inc.*, 238 NLRB 953 (1978); *Chrysler Corporation (Missouri Truck Plant)*, 242 NLRB 577, 582 (1979). Contrary to the Administrative Law Judge, the illegality of the discharge is not lessened by the arbitrator's finding that the discharge itself accords with an established plant rule.[10] And this last principle is also embodied in Board precedent.

In *Ohio Ferro-Alloys Corporation*, 209 NLRB 577 (1974), which the Administrative Law Judge erroneously cites as a decision in which the Board deferred to an arbitrator's decision which upheld a discharge such as the one here, the Board in fact was careful to note that the administrative law judge had found that ". . . the arbitrator did consider whether Schiesz was discharged for his union activities and that the arbitrator found that Respondent acted improperly in discharging Schiesz." The Board therefore deferred to the arbitrator's decision, and further deferred to the arbitrator's decision to order less than reinstatement and backpay because the employee failed to include seven arrests and sentence of 5 years to life at San Quentin Penitentiary on his employment application. The arbitrator there ordered reinstatement without backpay, which accorded with Board precedent in analogous circumstances with respect to remedy. *W. Kelly Gregory, Inc.*, 207 NLRB 654 (1973); there, despite our finding of a violation of Section 8(a)(3) in the employer's discharge of an employee for his protected activities, we declined to order reinstatement because the post-discharge discovery by the employer that the employee had falsified his employment application by failing to disclose a prior discharge for drinking and violations on his driving record supported a reasonable inference that if the employer had known of the drinking and driving violations it would not have hired the employee.[11] Accordingly, the Administrative Law Judge's attempt here to use the Board's holdings in the area of remedy to bolster the arbitrator's finding that Respondent's discharge of Kauffman was proper is plainly a misapplication of Board decisions.

Nor do the Administrative Law Judge's findings that the individual who discharged Kauffman was ignorant of her protected activity, that there are no independent expressions of animus evident in Respondent's conduct, or that Respondent's rules were not applied disparately to Kauffman, have anything to do with the issue here. While the Administrative Law Judge cites *Atlantic Steel Company*, 245 NLRB 814 (1979), to the contrary, the language of that decision reveals no such conclusion. Indeed, the majority's opinion, deferring to an arbitrator's decision that an employee's use of obscenity to a supervisor while in the production area during working time was legitimate grounds for discharge, found that the arbitrator's decision was not repugnant because:

> The Administrative Law Judge cited no decisions, however, and we know of none, where the Board has held that an employee's use of obscenity to a supervisor on the production floor, following a question concerning working, is protected as would be a spontaneous outburst during the heat of a formal grievance proceeding or in contract negotiations. [*Atlantic Steel, supra* at 816.]

True, the Board did defer to the arbitrator's factual findings in *Atlantic Steel* that the incident was not seized upon as a pretext for discharging the employee because of his protected activities, but once again, that is not at issue in this case.

In this case we may assume, as the arbitrator found and the Administrative Law Judge agreed, that Kauffman was discharged because of her false employment application, though it seems likely that was no more than a pretext. It is also irrebuttable that Kauffman had been working for Respondent for over a year and that but for her confrontation with Respondent's officials at the ECHRC meetings Respondent would not have investigated her employment application, and therefore would not have discovered the falsifications for which she was discharged. This conclusion is established by the admissions of Respondent's officials responsible for initiating the investigation.

My colleagues would do well to examine more carefully the record which they assertedly rely on for their conclusion that "a trier of fact could have inferred" that Respondent reinvestigated Kauffman's employment applicaton for discriminatory purposes. Such speculation seems vacuous in the face of Mezey's admission before the arbitrator that he reviewed Kauffman's personnel file because "if she was . . . going to be active in the Union [he] ought to be aware of Jessie Kauffman." That seems plain enough. What is not plain is any reasonable

[10] *Pincus Brothers, Inc.—Maxwell*, 237 NLRB 1063 (1978), cited by the Administrative Law Judge, is inapposite to the instant case. In *Pincus* the issue was whether the arbitrator there could reasonably have concluded that an employee's protected activity had been converted to an unprotected status by offensive conduct. On this issue, the Board examined the facts *de novo*.

[11] Note that such an inference may not be drawn here since Respondent hires college graduates for positions such as Kauffman's.

connection between Mezey's simple desire to be "aware" of Kauffman and his subsequent full reinvestigation of Kauffman, particularly since Kauffman's file showed her to be a good employee. That Mezey meant exactly what he said, i.e., that he investigated Kauffman because of her union activities, is evidenced by his testimony before the Administrative Law Judge. There Mezey testified that his motive was quite different, that he was concerned whether Kauffman was having problems with her job. Of course, Kauffman's file showed the contrary, but Mezey nevertheless conducted a full investigation.

My colleagues' characterization of the decisional law is a misstatement of the principle in issue here. The principle is that the investigation of an employment application begun because of activities protected by the Act, when other employees not engaged in protected conduct are not similarly investigated, i.e., here Respondent never asserted that it reinvestigates all its current employees 18 months into their tenure, is the evidence of and proves the discriminatory motivation not solely for *conducting* the investigation, which is self-evident, but for the discipline which is based on the results. In other words, this is a classic case of pretext.

Accordingly, Respondent investigated Kauffman's employment application because it learned of her protected activity, and the discharge which followed therefore violated Section 8(a)(3) of the Act. The Board has consistently so held, and so the arbitrator's decision herein is contrary to Board precedent and repugnant to the purpose and policies of the Act, and therefore is unworthy of deference. For all these reasons, I would find that Respondent violated Section 8(a)(3) of the Act by discharging Kauffman.

## DECISION

### STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge: This case was heard in Chicago, Illinois, on January 12 and 13, 1981, based on a charge filed by Jessie Kauffman, an individual, on September 25, 1979, and a complaint issued on behalf of the National Labor Relations Board, herein called the Board, by the Regional Director for Region 13 of the Board, on June 18, 1980, as thereafter amended.

The complaint alleges that Inland Steel Company, herein called Inland or Respondent, violated Section 8(a)(1) and (3) of the National Labor Relations Act. Respondent's timely filed answer denies the commission of any unfair labor practices.

All parties were afforded full opportunity to appear, to examine and cross-examine witnesses, and to argue orally. The General Counsel and Respondent have filed briefs which have been carefully considered.

Based on the entire record,[1] including my observation of the witnesses and their demeanor, I make the following:

### FINDINGS OF FACT

#### I. RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

Respondent is a Delaware corporation engaged in East Chicago, Indiana, in the manufacture, sale, and distribution of steel products. Jurisdiction is not in dispute. The complaint alleges, Respondent admits, and I find and conclude that Inland is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent's production and maintenance employees at its Harbor Works plant are represented for the purpose of collective bargaining by Local 1010 of the United Steelworkers of America, AFL-CIO, herein called the Union. The complaint alleges, Respondent admits, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. THE ALLEGED UNFAIR LABOR PRACTICE

##### A. *The Facts*

The General Counsel alleges that Respondent discharged Jessie Kauffman because she had engaged in union or other protected concerted activities. Respondent denies that the discharge was unlawfully motivated and contends that, inasmuch as Kauffman's discharge was the subject of an arbitration proceeding, the Board should defer to the arbitrator's decision pursuant to its decision in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955). The General Counsel acknowledges that Kauffman's discharge was the subject of an arbitration proceeding wherein the arbitrator held in favor of Inland, finding that Kauffman's discharge was for good cause. However, the General Counsel contends that *Spielberg* is not applicable because the arbitrator's decision is repugnant to the purpose and policies of the Act.

The essential facts herein are not in dispute.[2]

Jessie Kauffman applied fot a craft position within the production and maintenance unit at Respondent's Harbor Works on February 8, 1978. Fearing that she would be rejected as overqualified, she intentionally omitted from her application the fact that she had attended Cornell University from 1969 until 1973 and had graduated from that institution with a bachelor of science degree.[3]

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[1] Respondent's unopposed motion to correct the transcript is granted.

[2] Respondent contends that the arbitrator's factual findings should form the basis for the Board's resolution of the repugnancy issue. However, over Respondent's objection, the facts herein were litigated in their entirety before me. My factual conclusions are consistent with the arbitrator's. See *Pincus Brothers, Inc.—Maxwell*, 237 NLRB 1063, 1065-66 (1978); and *Dreis & Krump Manufacturing, Inc.*, 221 NLRB 309, fn. 1 (1975).

[3] Kauffman's fears, it appears, were unwarranted. Respondent hires college graduates for unit positions.

Rather, she stated that she was employed as a clerk and cashier at the Town & Country Store in Toledo, Ohio, for that period of time, terminating that employment when the store closed. She signed the application beneath the following statement:

> I understand that any omission or misrepresentation of material fact in this application may be considered as just cause for rejection of this application or dismissal from employment.

Respondent's safety rules booklet and its "General Rules for Safety and Personal Conduct" both contain a similar rule. Kauffman was aware of this rule.

Respondent's personnel department checked Kauffman's references but failed to discover that some of the information she had provided was not correct. She was hired on February 16, 1978. In May 1978, after making certain inquiries of her concerning two of her prior employers, Respondent closed its background check, apparently satisfied.[4]

There is no contention that Kauffman was other than a good employee. There were no complaints about her work and she had received no discipline during her tenure.

Kauffman became a member of Local 1010, the Union, and, beginning in about September 1978, began to be active within the Union, particularly on issues related to women's rights and sex discrimination. She attended various conferences, suggested and participated in the formation of a women's committee within the Union, wrote a couple of signed articles for the Union's newspaper, and actively tried to have the Union establish a child care facility so that members with children would be able to attend union meetings. While she was undeniably active in these pursuits, there is little evidence that Respondent was particularly aware of her activities. It had notice that she signed out on union business on several occasions and copies of the newspaper, including those containing her byline, were regularly received by it. Additionally, some supervisors attended one or two of the conferences which she attended. There is no evidence that any of them knew or recognized her at those times.

On June 5, 1979,[5] Kauffman attended the regular monthly meeting of the East Chicago Human Rights Commission, herein called the ECHRC,[6] to lend support to a sex discrimination charge filed by a fellow Inland employee. She was not the representative of, or a witness for, that other employee. Several other employees similarly attended. As was customary, the meeting was also attended by Vincent Soto, coordinator of the manpower planning and utilization section of Respondent's personnel department.

Following the regular business portion of the June 5 ECHRC meeting, the floor was opened for comment by the members of the public who were in attendance. Kauffman, introducing herself by name, as a member of the Union's women's committee, and as an employee of Inland, stated that she wanted to learn how to use the ECHRC to improve conditions for women and minorities at Respondent's plant. She asked a number of questions in regard to the proof required to establish discrimination and asserted that discriminatory practices occurred in the plant. Another employee, Joe Gutierrez, also spoke, criticizing Soto for his lack of attentiveness at the meeting.

Soto was late in arriving at the June 5 meeting, entering after the public comments had begun. He apparently missed hearing Kauffman's name. Following the meeting, Soto asked Fred Vasquez, a factfinder for ECHRC, who Kauffman was. Vasquez refused to tell him. He also asked whether the public comments would be reflected in the minutes of the meeting and whether those minutes would be available to the public.

On June 6, following the customary practice in his department, Soto reported on the June 5 ECHRC meeting to the staff of his section, including Michael Mezey, its administrator and his immediate supervisor. According to Mezey, Soto reported "that some unidentified female had stood up and made some disparaging remarks . . . something to the effect of making inquiries relevant to . . . Inland Steel's employment processes as relates to the hiring and utilization of the female." Soto told Mezey that he did not know who the woman was.[7] He also told Mezey of Gutierrez' disparaging remarks and reported that there were more people attending and speaking at this meeting than was usual.

On June 15, the ECHRC conducted a conference on affirmative action. Kauffman attended as the representative of the Union's Women's Committee. Mezey and Soto attended as representatives of their department. In the course of this conference, Soto pointed out Kauffman to Mezey as the woman he had referred to in regard to the June 5 meeting. When Kauffman asked a question about Respondent's affirmative action plan, Soto objected, arguing essentially that the plan was confidential. He similarly objected to a statement, made by the chairman of the Union's Civil Rights Committee, favoring the holding of public hearings.

On June 18, the Monday following the ECHRC conference, Mezey and Soto decided to call up Kauffman's personnel file. As Mezey testified before the arbitrator, he ordered up her file because of his "natural curiosity" and "made natural inquiries . . . about her, her career and her [Union] involvement." He felt "that if she was . . . going to be active in the Union [he] ought to be aware of Jessie Kauffman." Before me, he explained:

> After remembering what Mr. Soto had said about her remarks on the evening of the 5th, I began to wonder whether she was having problems in her department because of her vociferous display

[4] Respondent's exhibits indicate that, pursuant to a request of the personnel department at that time, Kauffman produced paystubs for her periods of employment at Town & Country and one other employer. As noted, she had never worked for Town & Country. The record does not establish how she managed to satisfy Respondent that she had.

[5] All dates hereinafter are 1979 unless otherwise specified.

[6] ECHRC is a local agency which functions under contract with the Federal Equal Employment Opportunity Commission to investigate complaints filed pursuant to Title VII of the Civil Rights Act.

[7] Soto denied having attempted to learn Kauffman's identity. However, Mezey, corroborating the testimony of Vasquez, testified that Soto reported that he had unsuccessfully asked a number of people to identify her.

> against Inland Steel or against its employment process. So, as a natural reaction as the affirmative action officer, I wanted to find out who she was, where she worked, so if there were any problems, I could naturally look into those problems if there were any to be looked into.

No employment problems were revealed by perusal of Kauffman's personnel file. However, both Mezey and Soto decided that there were some references in her application which were not corroborated, particularly a reference to her "college training at Cornell University" which was contained in a February 23, 1968, reference from her high school counselor. Mezey directed Soto to follow it up.

Soto then told Jerry Rubin, the assistant director of personnel, of the apparent discrepancies. They decided to look into them further and a decision was made to utilize an outside investigating firm, Equifax, to conduct the investigation.[8] In early July, Morgan Burke became an assistant director of personnel at the Harbor Works, working with Rubin. He and Rubin further discussed the discrepancies in Kauffman's application and the investigation was continued.

The Company's written policy statement on reference checking defined a major discrepancy in educational references as one covering a period of 4 years. It stated that such a discrepancy "would be an out and out falsification" and that, in such a case, "serious consideration should be given to termination." Respondent's statement of procedure on performance reviews also stated that where a "willful falsification or misrepresentation of material fact is determined . . . [t]he Assistant Director decides whether or not to write a falsification letter to the department head . . . [and] [o]n receipt of the falsification letter the department head either initiates termination or seeks through his Assistant General Manager approval to retain the employee." According to Burke, an assistant director of personnel does not possess the authority to discharge an employee for falsification.

On July 13, Burke sent a "falsification" letter to T. J. Mulligan, superintendent of the power and fuels department in which Kauffman worked. That letter, a standard company form, described the falsifications which had been uncovered and stated:

> As you know, a long standing Company policy has required department heads to suspend preliminary to discharge employees who deliberately falsify their employment applications. However, exceptions to this policy may be granted either by the Assistant General Manager of the involved department, or in the event of his absence, by the Assistant General Manager, Industrial Relations.
>
> Would you please respond promptly to me and indicate whether or not Jessie Kauffman will be suspended preliminary to discharge or retained as an employee subject to the procedure outlined above.

Burke denied having any knowledge of Kauffman's union activities or of her activities in support of women's rights at the time that he issued this letter.

Mulligan received Burke's letter when he returned from vacation in the latter part of July. Kauffman was called to Mulligan's office where she was confronted with the falsifications. She admitted the misstatements and explained that she had filled out the application in the manner that she had because she had experienced difficulties in getting employment, had been rejected in the past because she was deemed overqualified, and feared rejection by Inland. On August 1, Mulligan sent Kauffman a letter informing her that she was suspended for 5 days after which she was subject to discharge.[9] She was informed of her right to request a hearing before the superintendent of labor relations. That hearing was held on August 6. On August 14, Kauffman received a letter from L. R. Mitchell, superintendent of labor relations, which stated as follows:

> An investigation of this case, following the hearing conducted in this office, failed to disclose any circumstances that would justify our altering the decision of the department superintendent. Consequently, we can reach no other decision but that your suspension must conclude with discharge.

The collective-bargaining agreement between Respondent and the Union prohibits discrimination based on union activities, race, religion, national origin, and gender and provides for a grievance procedure culminating in final and binding arbitration. The grievance over Kauffman's discharge proceeded through the various steps of the grievance procedure to a hearing before Arbitrator Bert Luskin, the parties' permanent umpire, on December 18, 1979. In its prehearing brief to the arbitrator and in the lengthy arbitration hearing, the Union contended, among other things, that "the Company began a further investigation into Ms. Kauffman's employment and educational background in July, 1979 only after it had learned that she had assumed a leadership role in women's affairs within the Local Union." Respondent denied any motivation based on Kauffman's union or protected concerted activities and asserted that "for a period of more than 35 years it had taken a consistent position that it will enforce the Company rule against falsification of employment applications." The arbitrator agreed with Respondent stating: "Since 1943, arbitrators at Inland Steel have consistently upheld the Company's right to terminate an employee who deliberately provides the Company with false information in a application for employment." He continued:

> A careful analysis of all of the evidence in the record would indicate conclusively that the Company did not discriminate against Ms. Kauffman because of any Union activities in which she engaged as a member of the Local Union's committees . . . . The fact that the Company may have begun a reexamination of the information contained in her ap-

[8] Equifax has performed other, similar investigations for Respondent.

[9] Only once before had Mulligan been involved in a similar situation. That employee, too, was discharged.

> plication for employment after she served as spokesperson for a group of female employees who had attended a Human Relations Symposium, is in no way indicative of an attitude of harassment, discrimination or bias because of her sex or her legitimate Union activities.
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> * * * * *
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> The arbitrator must find that the Company did not in any way discriminate against the grievant because of her Union activities. The Company knew that Ms. Kauffman had been active for some period of time in Local Union affairs and had served on a number of Local Union committees. She was afforded the opportunity to be absent from work in order to carry out her legitimate Union activities and the Company had never interfered with grievant's right to engage in Union activities.

Finding that Respondent harbored no animus toward employees engaged in protected activities, had a longstanding and uniformly applied policy requiring termination of employees for falsifications of their applications, and had applied that policy in situations virtually identical to Kauffman's, the arbitrator concluded that "the Company had just and proper cause for terminating Jessie J. Kauffman from employment." He denied her grievance.

### B. *Analysis and Conclusions*

In *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), the Board held that it would defer to an arbitration award where the proceedings appear to have been fair and regular, all parties agreed to be bound, and the arbitrator's decision was "not clearly repugnant to the purposes and policies of the Act."[10]

In the instant case, the General Counsel acknowledges that the proceedings were fair and regular, that all parties agreed to be bound, and that the arbitrator considered and ruled on the unfair labor practice issue. The General Counsel argues against deferral solely on the ground that the arbitrator's decision was "clearly repugnant to the purposes and policies of the Act." Resolution of this issue requires a careful balancing of basic statutory policies; i.e., those set forth in Section 7 of the Act which enable employees to freely engage in protected activities and those which encourage collective bargaining and the voluntary resolution of issues arising under collective-bargaining agreements as best expressed by the Supreme Court in the *Steelworkers Trilogy*.[11]

In *Radio Television Technical School, Inc. t/a Ryder Technical Institute*, 199 NLRB 570 (1972), the Board concluded that an arbitral decision which "ignored a long line of Board and Court precedent construing the Act" was "clearly repugnant" within the meaning of *Spielberg*. See also *Dreis & Krump Manufacturing, Inc.*, 221 NLRB 309 (1975). Similarly, in *Alfred M. Lewis, Inc.*, 229 NLRB 757 (1977), the Board found arbitral decisions which "ignored well established Board precedent holding exactly to the contrary" to be clearly repugnant. And, in both the *Alfred M. Lewis* case and *Brewery Delivery Employees Local Union 46, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Port Distributing Corp.)*, 236 NLRB 1175 (1978), the Board stated that it would not defer to an arbitration award which was "contrary to unfair labor practice decisions under the Act."

However, the Board does not define repugnancy to require that, in every case, the arbitrator must reach the same decision it would have reached had the case come before it initially. Thus, in *Pincus Brothers, Inc.—Maxwell, supra*, where the question was whether an employee's distribution of an intemperately phrased leaflet had lost its protected character, the Board stated at 1064:

> We recognize that in some cases there may be reasonable disagreement as to whether or not that point is reached. In such cases we will not refuse to defer to the arbitrator's award simply because we would have reached a different result.

The Board refused to defer in *Pincus Brothers*, finding that the employee's conduct "constituted protected concerted activity and there can be no reasonable disagreement as to this finding." Accordingly, the award was deemed "clearly repugnant" and deferral was refused.[12]

The above-described tests of repugnancy, I believe, adequately balance the sometimes conflicting statutory policies, giving due weight to both the employees' rights to engage in protected activities and to the agreement of the parties to resolve their disputes through the grievance-arbitration procedure. The question thus presented is whether or not this arbitration decision has ignored "longstanding [or well-established] Board and Court precedent" and whether or not there could be "reasonable disagreement" on the question of whether the act complained of violated the Act. If there was the possibility of reasonable disagreement as to that conclusion, and if the precedent on that issue is less than conclusive, deferral would be warranted. It is appropriate then to turn to the precedents governing the underlying issue.

In *American Motors Corporation*, 214 NLRB 455 (1974), enfd. 525 F.2d 695 (7th Cir. 1975), the employer commenced an investigation in regard to the background of employees who were distributing leaflets protesting, with a revolutionary flair, the speedup of the production line. That investigation revealed deliberate omissions or falsifications in the employment applications of two of the employees. One, like Kauffman, had omitted a reference to attendance and graduation from a university be-

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[10] Subsequently, in *Raytheon Company*, 140 NLRB 883 (1963), enforcement denied on other grounds 326 F.2d 471 (1st Cir. 1964), the Board added the requirement that the arbitrator must have considered the unfair labor practice issue and ruled on it. See *Pincus Brothers, Inc.—Maxwell, supra.*

[11] See *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[12] Compare *Atlantic Steel Company*, 245 NLRB 814 (1979). See also former Member Penello's dissent in *Douglas Aircraft Company, Component of McDonnell Douglas Corporation*, 234 NLRB 578 (1978), wherein he defined the test of repugnancy to be whether or not the arbitrator was "palpably wrong."

cause of a fear of being found overqualified. The other had failed to reveal prior employment. Both were discharged pursuant to the employer's rules establishing such falsification as a dischargeable offense. As the Administrative Law Judge, whose decision the Board adopted with modifications not here relevant, pointed out, the distribution of the leaflets constituted union and/or concerted activity protected by Section 8(a)(1) of the Act, the Act prohibits employer interference, restraint, or coercion of employees engaged in such protected activities, and the "motivating force leading to the discovery of the 'falsification' . . . was distribution of these leaflets." He concluded: "The law is settled that an employer may not threaten or discharge its employees for engaging in these activities . . . . The discharges are violative of the Act even though motivated only in part by such consideration." The Administrative Law Judge went on to additionally conclude that the employer's reliance upon the falsification of the employment applications was merely a "pretext upon which to discharge [the employees] for having engaged in union and/or concerted protected activities . . . ." He also found that the employer had otherwise violated Section 8(a)(1).

Similarly, in *Chrysler Corporation (Missouri Truck Plant)*, 242 NLRB 577 (1979), the Board adopted a finding that the employer had violated Section 8(a)(3) and (1) by discharging employee Hollis for filing grievances. The Administrative Law Judge had concluded that the employer's reliance on a falsification in Hollis' employment application (in a manner similar to Kauffman's) was but a pretext to "cover the true motive." In reaching that conclusion, he pointed out that the employer had known of the defect in the application for 3 months prior to the discharge and had not previously confronted Hollis with it. He further noted the absence of evidence that Hollis' employer had ever discharged an employee for a similar offense.[13] After reaching the conclusions set forth above, the Administrative Law Judge (at 582) went on to state as follows:

> Even absent a finding of pretext from which I infer the unlawful motive, I would nevertheless conclude that his discharge was violative of Section 8(a)(3) because the causative event leading to the Respondent's discovery that Hollis had "falsified" his application was his participation in the union meeting arguing against contract ratification. Inasmuch as this activity was clearly protected by Section 7 of the Act and since Section 8(a) (1) prohibits employers from interfering with or coercing employees in the exercise of rights guaranteed them by Section 7, the Company's discharge of Hollis intertwined with and arising out of his protected activity necessarily was violative of the Act. *American Motors Corporation*, 214 NLRB 455 (1974).[14]

In *Campbell "66" Express, Inc.*, 238 NLRB 953 (1978), it was found that an employer, who had earlier ignored a reference check indicating the possibility of falsifications in the employee's application and who had threatened to discharge the employee for filing grievances, undertook an investigation into the background of the employee in order to find a contractually acceptable basis for discharging that employee after he had filed a grievance. The discharge, based on falsifications which were then discovered, was held violative of Section 8(a)(1) and (3). In so concluding, the Board adopted the following conclusions of the Administrative Law Judge (at 963):

> I am convinced that the investigation itself was undertaken for the purpose of finding a pretext to terminate [the employee]. Even though that pretext was found, and might otherwise have been a legitimate basis for discharging an employee, the very fact that the search itself was undertaken for motivations unlawful in character suffices to make the otherwise legitimate basis for the discharge violative.

Enforcement of the Board's *Campbell "66"* decision was denied in *N.L.R.B.* v. *Campbell "66" Express, Inc.*, 609 F.2d 312 (7th Cir. 1979). The court found insufficient evidence to support the findings of an unlawful threat and employer animus against those who engaged in protected activities. It stated that the employer had a good reason to discharge the employee once it learned of the falsification and held that the General Counsel had failed to sustain its burden of finding an "affirmative and persuasive reason . . . why the employer had rejected the good cause and chose a bad one."

Similarly, in *Firestone Steel Products Company, Division of the Firestone Tire & Rubber Company*, 219 NLRB 492 (1975), enforcement denied *sub. nom. Firestone Tire & Rubber Co.* v. *N.L.R.B.*, 539 NLRB F.2d 1335 (4th Cir. 1976), the Board found violative a discharge based upon the falsification of an employment application where the investigation into the information contained on the application was commenced only after the employee's union activity had incurred the employer's wrath. In denying enforcement the court pointed out that the employer had a long practice of discharging employees upon discovering falsifications in their employment applications, there was no evidence of animus, and there was no evidence that the person who made the discharge decision had knowledge of the employee's union activities. See also *Douglas Electric Cooperative, Inc.*, 194 NLRB 821, 826 (1972).

In considering whether this arbitration decision is "clearly repugnant," guidance may also be drawn by examining the effect the Board has given to arbitrators' de-

[13] The instant case is distinguishable from *Chrysler Corporation* in both of these particulars. Thus, contrary to the contention of the General Counsel, I cannot find that Respondent knew of Kauffman's falsification merely because there was a remark about her "college training at Cornell" contained in a reference from her high school guidance counselor. That Respondent could have discovered the falsification earlier, had it noticed this reference, does not mean that it did. And, the record herein adequately establishes that Respondent has discharged employees for similar serious falsifications.

[14] Compare *Pork King Company, Inc.*, 252 NLRB 99 (1980), wherein the Board, Member Jenkins dissenting, found no violation in a discharge which resulted from evidence discovered when an employer began to watch an employee's activities more closely after that employee had begun to actively press grievances.

cisions in cases involving both a discharge for otherwise protected concerted activity and evidence of falsified employment applications. In *Ohio Ferro-Alloys Corporation*, 209 NLRB 577 (1974), the arbitrator found that an employee had been discharged for reasons violative of the Act. He ordered reinstatement. However, since the employee had falsified his employment application to deny an arrest, conviction, and substantial jail term for the commission of a felony, the arbitrator refused to award the employee any backpay. The Board, in deferring to the arbitrator's award, stated: "Where an employee has obtained his job through the use of a false statement in his application, it is not repugnant to the purposes and policies of the Act to order less than reinstatement with backpay." In *Jack Hodge Transport Inc.*, 227 NLRB 1482 (1977), the Board (Chairman Fanning dissenting on other grounds) deferred to a similar award in a situation wherein the employer had seized upon false statements in the job application as a pretext to cover the discharge of an employee for an unlawful reason.

In *W. Kelly Gregory, Inc.*, 207 NLRB 654 (1973), after an employee had been discharged in violation of Section 8(a)(3) for filing grievances, the employer learned that he had falsified his employment application by failing to reveal a discharge by a prior employer for "a drinking problem" and violations on his driving record. The Board found that it was reasonable to infer that had the employee truthfully answered the questions on his job application Respondent would not have hired him.[15] On that basis, although the Board found that the employee had been wrongfully discharged, it also found that he was not entitled to reinstatement or backpay because of the falsifications.

Considering the facts of the instant case in light of the above-described precedent, I cannot conclude that the arbitrator has "ignored a long line of Board and Court precedent construing the Act," as in *Ryder Technical Institute, supra, Dreis & Krump*, and *Alfred M. Lewis, supra*, or that there exists no possibility of a "reasonable disagreement" on the underlying issue, as in *Pincus Brothers, Inc.—Maxwell, supra.*

Thus, although there is language (or dicta) in both the *American Motors and Chrysler Corporation* decisions from which one might argue that a discharge based on facts learned in an investigation brought about by an employee's protected activities is *per se* violative of the Act, there are factors which distinguish this case from those and also from the *Campbell "66"* and *Firestone Steel* decisions, cited *supra*. Thus, in all of those cases there was evidence of employer animus toward the union and toward the exercise of statutory rights which warranted a conclusion that the employers' reliances on falsified applications were merely pretexts to cloak discriminatory motivation. Contrary to the General Counsel's contentions, I do not find such animus here. Neither the single finding in an earlier case that Respondent violated Section 8(a)(1) by maintaining an invalid no-distribution rule, *Inland Steel Company*, 238 NLRB 1204 (1978), nor the statements of Soto and Mezey establish that quantum of animus.

Moreover, as previously noted, this case is distinguishable from *Chrysler Corporation* in that there is no evidence from which to conclude that Respondent applied its falsification rules disparately or that it knew of, and previously ignored, Kauffman's falsification. Thus, unlike the cited cases, the record herein does not warrant a conclusion that Respondent called for the investigation into Kauffman's background in order to find a basis on which to discharge her or that, once found, Kauffman's falsification was seized on as a pretext to hide an otherwise unlawful motive.

Additionally, I note that in concluding that the discharges in *American Motors* were violative, the Judge found that they were "motivated only in part" by the protected activities. In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the Board redefined the burdens of proof in discrimination cases and moved away from the "in part" test. It is at least arguable herein from the existence of the falsification rule and Inland's past practices in enforcing it that Respondent has met its burden, as described in *Wright Line*, of establishing that "the same action would have taken place even in the absence of protected conduct."

I take note, also, of the fact that the record contains no evidence that the individuals recommending and effectuating Kauffman's discharge had any knowledge of her protected activities. Soto and Mezey, of course, knew of those activities and they were the ones who initiated the investigation. However, it was Burke and Mulligan who recommended and effectuated the discharge. Burke credibly denied such knowledge and Mulligan's knowledge of her involvement in protected activities was remote and limited to a possible awareness that she, like many others, had been permitted time off for union activities. See *United Broadcasting Company of New Hampshire, Inc., d/b/a WMUR-TV*, 253 NLRB 697 (1980), wherein the Board found that suspicious circumstances did not warrant an inference that the employer representative who recommended the alleged discriminatee's discharge had knowledge of the union activities. In the absence of such an inference, the Board concluded, the General Counsel had failed to establish a *prima facie* case of unlawful motivations. In this regard, the factual picture herein is not unlike that in *Firestone Steel Products, supra*, as that case was viewed by the Court of Appeals for the Fourth Circuit. There the court pointed out the absence of evidence to establish that the person who made the discharge decision was aware of the protected activities and denied enforcement to the Board's Order, notwithstanding the Board's finding that the employees' union activities had given rise to the investigation which lead to the discovery of the falsified applications. The court pointed out in its decision, as the arbitrator herein did in his, the absence of union animus and the existence of a longstanding practice of discharging employees who falsified their employment applications. See also *Campbell "66" Express, Inc., supra*, wherein the Court of Ap-

[15] No such inference is warranted in the instant case. Inland hires college graduates for unit jobs.

peals for the Seventh Circuit reached a similar conclusion.[16]

Moreover, the Board's decisions in *Jack Hodge Transport, Ohio Ferro-Alloys, supra*, and *W. Kelly Gregory, supra*, indicate that the Board does take into consideration, at least in the area of remedy, the fact that an employee has falsified an employment application. As previously noted, even in a situation like the instant case, where the union activity gave rise to the investigation, the Board has specifically rejected the contention that less than a full reinstatement and backpay remedy was repugnant to its policies. *Jack Hodge Transport, supra.* Given that the Board may deny a remedy to an individual who has falsified his employment application, can it be said that an arbitrator's decision finding a discharge based upon a falsification justified is *clearly* repugnant to the Act's policies?

Finally, I have considered this case in light of *Atlantic Steel Company, supra.* Therein, the arbitrator upheld the discharge of an employee who had called his supervisor a "lying son-of-a-bitch" while questioning that supervisor about working conditions. The Administrative Law Judge concluded that deferral was not warranted because the arbitrator's decision was repugnant to the policies of the Act. The Board rejected that conclusion, pointing out that the arbitrator had considered the factors which the Board considers and had determined that the employee's discharge was warranted based on reasons which were not repugnant to the Act. Here, as in *Atlantic Steel,* the arbitrator considered the factors which the Board considers (particularly animus and disparity of treatment) and concluded that the employee's discharge was warranted, based upon reasons which were not repugnant to the Act; i.e., the violation of a longstanding rule.

Accordingly, I must conclude from all of the foregoing that the arbitrator's decision herein is not "clearly repugnant to the purposes and policies of the Act," and that deferral to that arbitral decision is warranted.

Upon the basis of the entire record, I make the following:

## CONCLUSION OF LAW

It would not effectuate the purposes and policies of the Act to assert jurisdiction with respect to the allegations of the complaint relating to the discharge of Jessie Kauffman.

Upon the basis of the foregoing findings of fact, conclusions of law, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:

## ORDER[17]

The complaint herein is dismissed in its entirety.

[16] The Administrative Law Judge is aware of his obligation to follow and apply established Board precedent rather than contrary court authority. See *Ford Motor Company (Chicago Stamping Plant)*, 230 NLRB 716 (1977). The decisions of the circuit courts in both *Firestone Steel* and *Campbell "66"* are relevant herein, however, to determine whether the arbitrator failed to follow "long established Board and Court precedent" (*Ryder Technical Institute, supra*) and whether there existed the possibility of "reasonable disagreement" (*Pincus Brothers, Inc.—Maxwell, supra).*

[17] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.